COPY

October 15, 1954

Attorney General

George F. Nelson, Esq.,
Assistant Attorney General

Totten Trusts, so-called

Winfield S. Phillips, Bank Commissioner,
State House

Dear Mr. Phillips:

Your October 1, 1954 request for ruling on the status of Totten Trusts, so-called (Matter of Totten, 179 N.Y. 112), in New Hampshire, poses a situation wherein an individual has opened an account in his name as trustee for another, thereafter retained control of the funds and otherwise treated the account as his own property, now has deceased leaving funds on deposit in the account, and you desire to clarify situations in New Hampshire where some banks consistently consider the fund as belonging to the beneficiary and other banks regard the fund as assets of the estate of the trustee depositor.

The question has arisen many times in this State, in varying circumstances, for judicial consideration. Bartlett v. Remington, 59 N.H. 364, Towle v. Wood, 60 N.H. 435, Morey v. Angeen 61 N.H. 134, Smith v. Bank, 64 N.H. 231, Fellows v. Fellows, 69 N.H. 345, Bean v. Bean, 71 N.H. 538, Blaze v. Cochrane, 71 N.H. 585, Harriman v. Bunker, 79 N.H. 127, Fernald v. Fernald, 80 N.H. 76, Burns v. Nolette, 83 N.H. 492, Packard v. Foster, 95 N.H. 49, and Nashua Trust Co. v. Nosgofian, 97 N.H. 17.

From these cases the principle is readily adduced that if the beneficiary never had access to the fund (R.L. c. 309, s. 20) and the depositor retained full control over the deposits until his death, there has been no gift Inter vivos to the proposed beneficiary. A situation where a depositor seeks to keep control of the deposits during his lifetime, and to transfer the balance, if any, upon his death to his beneficiary in the form of arrangement set forth above is testamentary in character and invalid under the statute of wills.

As recently as April, 1951, our court, though acknowledging that there have been situations in which rights of donee beneficiaries have been recognized and enforced in equity (Toner v. Long, 79 N.H. 458, Knox v. Perkins, 86 N.H. 66) pointed out in the above case of Nashua Trust Co. v. Nosgofian, 97 N.H. 127

that even "a deposit by one in the name of himself or another, or the survivor, is unavailing in and of itself to give the other any ownership or interest in the account" and the claimant has the burden of proving all the elements of a valid gift, including "manifest intention of the donor to give and an unconditional delivery and acceptance of the thing given". Chapter 162, Laws of 1953, largely negatived this decision although obvious ambiguity exists in the exception of R.L. c. 309, s. 20 from its application. The principle of these statutes appears limited to joint accounts.

Without barring the possibility of surrounding circumstances leading to a different result in special cases, if a trust was intended and the donor retained sole control of the deposit in his lifetime, the arrangement is void under the statute of wills and the deposit fund is an asset of the estate of the deceased depositor notwithstanding his designation of himself as trustee for another.

Decision as to the existence of special circumstances to take a given case out of this general rule is the function and responsibility of bank counsel upon which we do not by this opinion presume to intrude.

Very truly yours,

George F. Nelson
Assistant Attorney General

GFN:HP